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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY GOSS,

Defendant and Appellant.

D072407

(Super. Ct. No. SCD269190)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Affirmed in part; sentence vacated, remanded with directions.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Kathryn Kirschbaum and Britton B. Lacy, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony B. Goss appeals the judgment on his conviction by jury of attempted residential burglary. (Pen. Code<sup>1</sup>, §§ 664, 459, 460, subd. (a); all further statutory references are to this code unless noted.) Goss received a total term of 14 years in prison.

On appeal, Goss contends that insufficient evidence supports the conviction, because it was based on accomplice testimony but without independent corroborative evidence connecting him to the crime. (§ 1111 [evidence "tend[ing] to connect the defendant with the commission of the offense" required where accomplice testimony presented; *People v. Romero and Self* (2015) 62 Cal.4th 1, 32 (*Romero*) ["for the jury to rely on an accomplice's testimony about the circumstances of an offense, it must find evidence that ' "without aid from the accomplice's testimony, tend[s] to connect the defendant with the crime." ' "]; *id.* at p. 37.)

Goss also argues the jury received improper or confusing instructions about how it should consider his pretrial statements as they were reported by the accomplice, again with respect to the subject of corroborating evidence. (CALCRIM Nos. 335, 358, 359.)

In our original opinion in this matter, filed August 29, 2018, we found Goss's arguments lacked merit and affirmed the judgment. The remittitur was issued on November 30, 2018. However, Goss filed a motion to recall the remittitur and reinstate his appeal. He argued that Senate Bill No. 1393, which became effective on January 1, 2019, requires this court to remand this matter back to the trial court for resentencing.

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

Senate Bill No. 1393 provides a trial court with discretion to strike an enhancement for a prior conviction of a serious felony under section 667, subdivision (a)(1). The trial court did not have such discretion at the time Goss was sentenced in this matter.

We granted Goss's motion, recalled the remittitur, and reinstated the appeal. We also ordered Goss to file a supplemental brief, within 20 days of our order, addressing the potential impact, if any, of Senate Bill No. 1393 on his case. The People were to file a supplemental brief within 20 days after Goss filed his supplemental brief.

Goss filed a supplemental brief, arguing this matter must be remanded to the trial court for resentencing under Senate Bill No. 1393. In the People's supplemental brief, they agreed with Goss.

We therefore vacate Goss's sentence and remand this matter back to the superior court for resentencing. In all other respects, we affirm the judgment.

## I

### *FACTS*

Goss and codefendant Asuan Stoll were arrested at the scene of an interrupted residential burglary of a second floor apartment occupied by Scott Schmidt. As Schmidt was getting ready for work around 7:30 a.m. on October 24, 2016, he heard a scratching noise at his front door. He could not see anything out of the peephole in the door and called 911 when the scratching continued. He told the 911 dispatcher that he was starting to smell smoke and see flames through the crack between the door and the molding. The

911 dispatcher told him to lock himself in, saying that police were nearby and would soon be at the door.

Schmidt had a barbecue grill (the grill) located about eight feet away from his door, to the left. As he looked out the peephole again, he could see a man wearing a blue baseball cap, crouching four or five feet from his door next to the grill. Police officers knocked on his door probably one to two minutes later.

Sergeant Jacob Mosteller was the first to arrive, about seven minutes after the first 911 call came in. The call described a burglary in progress, with a description of a Black male wearing a blue cap. Mosteller waited at the downstairs entryway with his gun drawn, until his cover units arrived. He saw a man wearing a blue cap looking over the upstairs wall. About a minute later, the sergeant was joined by Officer Erika Boroquez, who was wearing a body camera. Within a few minutes, they saw two Black men, one with a blue cap, coming down the outside staircase. As shown in the body camera footage played for the jury, the officers stopped, handcuffed and arrested them, and Boroquez pulled an object out of the first man's (Goss's) pants or waistband. This was a white sock, which she threw onto the stairway. Stoll had a screwdriver in his pocket.

The officers went upstairs to search the scene and found two screwdrivers and a red lighter underneath the doormat of an apartment next to Schmidt's unit. Near the grill, they found another white sock wrapped within a black T-shirt, wrapped around a bar that was part of a tire jack. This evidence was sent to the forensics laboratory for testing, but no evidence about fingerprints or DNA evidence was presented at trial.

Both Goss and Stoll were charged with attempted residential burglary. Before trial, Stoll pleaded guilty to the attempted burglary charge and agreed to testify against Goss, in the hope of getting a lighter sentence. He told the jury the burglary was Goss's idea, and the only reason Stoll participated was that he needed money, because he was homeless and the paycheck he was expecting was delayed. He said that Goss told him there was a potential burglary location that Goss had been "scoping" out for some time, next to his friend's, "Texas's," apartment unit that he sometimes visited. They stayed together at another friend's house that night.

The next morning, Goss gave Stoll some screwdrivers, a bar from a tire jack, a red lighter, and some socks to use as gloves, to avoid leaving fingerprints. Goss took some socks too. They went to the chosen apartment, knocked on the door, then tried to use the screwdrivers to push through the door lock. The door had weather stripping that was getting in the way of accessing the lock, so Goss tried to burn it away with his lighter. Stoll was not sure whether either of them had used the socks as gloves while trying to break in. Stoll suggested that Goss kick down the door. When they heard a car door slam down below, Stoll realized that a police officer had arrived, and notified Goss, who started trying to hide the tools they had brought under a nearby doormat and behind the grill. As they went downstairs, they were arrested by other arriving officers.

Pretrial, several motions in limine were decided. Goss was originally charged with arson as well as burglary, but his motion to dismiss the arson charge was granted. On his motion to exclude evidence, the court agreed to present the body camera video to the jury without sound because Goss had said things to the officers, while at gunpoint,

that were evaluated to be custodial, non-Mirandized, inadmissible statements. The court also ruled that the video screen captures of the socks being found on Goss's waistband and on the ground would be admissible because they were visible without the officers' questioning or narration. Both officers testified at trial, as did Schmidt and Stoll. However, Goss did not testify.

Following instructions on how to consider an accomplice's testimony and other relevant topics, the jury convicted Goss of attempted residential burglary. At sentencing, Goss admitted to one prison prior (§ 667.5, subd. (b)) and two prior "strike" convictions (§§ 667, subds. (b)-(i), 668, 1170.12). He also admitted to two prior serious felony convictions (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)). The trial court struck one of the strike priors. Goss was sentenced to an aggregate prison term of 14 years, composed of the middle term of two years, doubled to four years by the remaining strike, plus 10 years for the two prior serious felony convictions. An enhancement pursuant to section 667.5 was stayed. He appeals.

## II

### *CORROBORATION OF ACCOMPLICE TESTIMONY*

#### A. Contentions and Legal Principles

Goss initially argues no independent evidence was presented that was sufficient to corroborate Stoll's accomplice testimony, by connecting Goss individually to the commission of the offense. (*People v. Johnson* (1980) 26 Cal.3d 557, 577 [requirement of substantial evidence to support conclusions of trier of fact].) Even though accomplice testimony would qualify as substantial evidence to sustain a conviction, the Legislature

has for policy reasons created an exception to the substantial evidence test and requires accomplice testimony to be corroborated. (*Romero, supra*, 62 Cal.4th 1, 32.) Thus, section 1111 "is based on the Legislature's determination that ' "because of the reliability questions posed by" ' accomplice testimony, such testimony ' "by itself is insufficient as a matter of law to support a conviction." ' " (*Romero, supra*, at p. 32.)

We apply well established principles of law to evaluate the corroboration of accomplice testimony. Section 1111 precludes a conviction based solely on the testimony of an accomplice, requiring corroboration "by such other evidence *as shall tend to connect the defendant with the commission of the offense.*" (Italics added.) Thus, corroborative evidence need not directly connect the accused with the offense but need only tend to do so. The requisite evidence " 'need not independently establish the identity of the [perpetrator]' [citation], nor corroborate every fact to which the accomplice testifies [citation]." (*Romero, supra*, 62 Cal.4th at p. 32.) " 'The entire conduct of the parties, their relationship, acts, and conduct may be taken into consideration by the trier of fact in determining the sufficiency of the corroboration.' " (*Ibid.*)

" ' "The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime." ' [Citation.] ' "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's

testimony, tend to connect the defendant with the crime." ' [Citation.] 'The evidence is "sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." ' " (*People v. Williams* (2013) 56 Cal.4th 630, 678-679 (*Williams*); *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128; *People v. Pedroza* (2014) 231 Cal.App.4th 635, 651, 657.)

Evidence of a defendant's flight after the charged crimes were committed " 'supports an inference of consciousness of guilt and constitutes an implied admission, which may properly be considered as corroborative of the accomplice testimony.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 983.)

#### B. Analysis

Goss claims that the evidence only showed he was present at the apartment building at the time of the arrest, but not that he was involved with the charged offense or with Stoll as an admitted perpetrator. He also claims the evidence of the sock found in his pocket was insignificant without the aid of Stoll's accomplice testimony, to connect him to the offense.

We are entitled to consider the " 'entire conduct of the parties, their relationship, acts, and conduct.' " (*Romero, supra*, 62 Cal.4th at p. 32.) Within minutes of the 911 call and of the arrival of police on the scene, Goss was found to be coming downstairs from the site of the attempted break-in, accompanying the man in the blue cap that Schmidt had seen crouching outside his door and Mosteller had seen looking out from upstairs. Goss was observed to be in close proximity in time and place with the attempted break-in. (*People v. Davis* (1962) 210 Cal.App.2d 721, 729 [more than mere proof of the



defendant's association with events constituting offense is required for corroboration, such as his association within close proximity of their timing and placement].) The corroborating evidence from the responding officers, even if viewed as slight, independently established Goss's flight from the scene, which could reasonably be interpreted as showing a consciousness of guilt of the charged offense. (*Williams, supra*, 56 Cal.4th 630, 679; *People v. Hayes* (1999) 21 Cal.4th 1211, 1271.)

No fingerprint or DNA evidence was presented about the tools or the two white socks found in the area, and Goss contends he was not independently shown to be sufficiently closely connected to the crime scene and methods. He questions whether the two white socks were demonstrated to be of similar make and model. It is well accepted that corroborative evidence under section 1111 " " "may be circumstantial or slight and entitled to little consideration when standing alone." " " (*Romero, supra*, 62 Cal.4th at p. 32.) This jury saw the body camera video of one of the officers pulling one white sock out of Goss's waistband area, during the arrest on the stairway. The jurors also saw pictures of tools and another wrapped-up white sock and shirt stowed under the grill upstairs, eight feet away from the damaged apartment door at the scene. This evidence of the unusual locations of the two white socks tended to corroborate Stoll's testimony and to connect Goss with the attempted break-in. Together with the burglary tools found under the grill, there was corroboration that Goss was linked to the attempts at burglary and a cover-up.

Circumstantial evidence independent of Stoll's testimony was presented that tended to connect Goss to the charged crime, thus allowing the jury reasonably to decide

on the truthfulness of that accomplice testimony on how the break-in occurred and how Goss participated in it. Because we have concluded this evidence was properly admitted and could tend to connect Goss to the charged offenses, the jury's " 'determination on the issue of corroboration is binding on [us].' " (*Romero, supra*, 62 Cal.4th at p. 32; see *People v. Santo* (1954) 43 Cal.2d 319, 330 ["[i]t was for the jury to determine the weight, if any, against defendants of such evidence"].)

### III

#### *JURY INSTRUCTIONS*

Goss contends the judgment should be reversed because the accomplice instruction the court gave, CALCRIM No. 335, was incorrectly combined with versions of CALCRIM Nos. 358 and 359, regarding the use of prior out-of-court statements. He contends that in this factual context, these were contradictory and confusing instructions that could not be harmonized while the jury evaluated Stoll's testimony. He argues that the error is cognizable on appeal, even without any objection at trial, because his substantial rights were affected. (§ 1259; see *People v. Hernandez* (1988) 47 Cal.3d 315, 353.)

#### A. Background

During the discussions on jury instructions, defense counsel told the court twice that he read through the package of proposed instructions several times and did not see any objections to any of them. The court proceeded to instruct the jury in standard and modified CALCRIM versions, including language about considering the instructions as a whole and not assuming that any particular version of the facts was indicated.

(CALCRIM No. 200.) The jury was told that the testimony of only one witness can prove any fact, except for Stoll's testimony, which required supporting evidence.

(CALCRIM No. 301.) In particular, CALCRIM No. 335 on evaluating accomplice testimony was given as follows:

"If the crime of attempted burglary was committed[,] then [Stoll] was an accomplice to that crime. . . . You may not convict the defendant of attempted burglary based on the statement or testimony of an accomplice alone. You may use the statement or testimony of an accomplice to convict the defendant only if, one, the accomplice's statement or testimony is supported by other evidence that you do believe; two, that supporting evidence is independent of the accomplice's statement or testimony; and, three, that supporting evidence tends to connect the defendant to the commission of the crime.

". . . [S]upporting evidence, that supporting evidence may only be slight. It does not need to be enough by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily just disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution in light of all the other evidence."

The court further instructed the jury in the language of CALCRIM No. 358, as follows: "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether the defendant made any of these statements in whole or in part. If you decide the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to

decide how much importance to give to the statements." CALCRIM No. 359 was also given, stating in relevant part:

"The defendant may not be convicted of any crime based on his out-of-court statements alone. You may rely on the defendant's out-of-court statements to convict him only if you first conclude that other evidence shows that the charged crime was committed, as we said, that other evidence may be slight and it need only be enough to support a reasonable inference that a crime was committed. [¶] . . . . You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

#### B. Rules of Review; Analysis of Forfeiture

"In determining the correctness of jury instructions, we consider the instructions as a whole. [Citation.] An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.)

In claiming error, Goss argues that "CALCRIM 358 and 359 did not instruct the jury that if the out-of-court statements by the appellant were contained only in the accomplice's testimony there must be corroborating evidence that the statements were made. Without such an instruction, the jury was essentially presented with accomplice testimony which the jury was told must be corroborated (CALCRIM 335), but CALCRIM 358 and 359 instructed that statements by the defendant were to be treated differently." Since Goss did not testify and present any of his own statements, and since the body camera video was played to the jury without sound, he points out that the jury only heard about any of his alleged statements through Stoll. He therefore argues that the

specific accomplice instruction was undermined by CALCRIM Nos. 358 and 359, which "logically carved out an exception to the need for corroboration in the case of statements the accomplice claimed appellant had made."

In their respondent's brief, the People contend such claims of error were forfeited, since Goss had the opportunity to seek modification or clarification at the time the court read these instructions, but failed to do so. Further, the People contend these were legally correct instructions that did not require any such clarification or modification, even if such an affirmative request had been made. (See *People v. Lucas* (2014) 60 Cal.4th 153, 290-291 & fn. 51 [failure to object to otherwise legally correct instructions forfeits the error]; *People v. McKinnon* (2011) 52 Cal.4th 610, 670.)

Goss does not suggest CALCRIM Nos. 335, 358, and 359 misstate the law, but only that under these circumstances, they could be construed improperly, alone or together. (See *People v. Guivan* (1998) 18 Cal.4th 558, 570 [" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' "]; *People v. Mackey* (2015) 233 Cal.App.4th 32, 106 [same].) If Goss had objected to the adequacy of the instructions, or offered alternatives, the trial court could have considered whether to give an additional or clarifying instruction regarding the relationship of Stoll's accomplice status and the requirement of corroboration. Not having done so, Goss has forfeited this issue for purposes of appeal. (*Ibid.*; see *People v. Bolin* (1998) 18 Cal.4th 297, 328; *People v. Whalen* (2013) 56 Cal.4th 1, 81-82.)

Finally, Goss cannot show anything in the record creating a sua sponte duty in the trial court to modify the instructions on evaluating his out-of-court statements, or to give additional instructions on corroboration requirements.

#### IV

##### *SENATE BILL NO. 1393*

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, on January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; see §§ 667, subd. (a)(1), 1385, subd. (b).) Under the version of these statutes at the time Goss was sentenced, the court did not possess such discretion.

In his supplemental brief, Goss maintains that Senate Bill No. 1393 applies retroactively, and therefore, we must remand this matter for resentencing under the bill. The People concede that Senate Bill No. 1393 applies to Goss retroactively if his judgment is not yet final. Because we granted Goss's motion to recall the remittitur and reinstate his appeal, the judgment as to Goss is not final. As such, the People agree that we should remand the matter for resentencing. Recently, our colleagues in Division Two of the Fourth District concluded Senate Bill No. 1393 applies retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We adopt the reasoning of Division Two here. (See *id.* at pp. 971-973.) Accordingly, we conclude that Senate Bill No. 1393 applies retroactively, and this matter must be remanded to the superior court for resentencing under the revised law.

## DISPOSITION

We vacate Goss's sentence and remand this matter to the superior court to resentence Goss consistent with this opinion. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.